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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

GREG CONTOS,	
Plaintiff and Appellant,	A140843
v.	(San Francisco County Super. Ct. No. CGC-12-525499)
KOKKARI, LTD. et al.,	,
Defendants and Respondents.	1

Plaintiff Greg Contos (plaintiff) filed a putative class action complaint on behalf of approximately 232 current and former employees against Kokkari, Ltd. and its owners (collectively Kokkari) alleging wage and hour violations. After 182 putative class members settled with Kokkari, plaintiff filed a class certification motion, seeking to represent all employees who had worked at Kokkari, including those who had settled their claims. The trial court denied the motion.

Plaintiff appeals. He contends: (1) the court erred by determining the class was not ascertainable; (2) the settlement agreements presented common questions of law and fact; (3) his claims were typical of the putative class; and (4) he was an adequate class representative. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

George Marcus and Kenneth Frangadakis own Kokkari, a Greek restaurant in San Francisco. Kokkari employs three groups of nonexempt (hourly) employees: (1) front of the house staff, such as servers, bussers, food runners, bartenders, and baristas; (2) administrative staff; and (3) back of the house staff, such as cooks, dishwashers, and janitors. Plaintiff Greg Contos was a server at Kokkari from March 2011 until August 2012, when he was fired for "Excessive Absenteeism."

After his termination, plaintiff filed a putative class action complaint against Kokkari seeking to represent a class of current and former nonexempt employees who worked at Kokkari from October 2008 until the resolution of the lawsuit. The operative first amended complaint alleged claims for: (1) failure to pay overtime wages; (2) failure to reimburse for business expenses; (3) unfair competition (Bus. & Prof. Code, § 17200); and (4) civil penalties under the Private Attorney General's Act (Lab. Code, § 2698, et seq.). Kokkari determined there were 232 potential class members.

Kokkari offered putative class members settlement payments to release the claims asserted in the lawsuit. Kokkari general manager Paul Kirby met individually with most current Kokkari employees — and also held a group meeting — to discuss and distribute the settlement agreements. Kirby sent each former Kokkari employee a settlement agreement. Some settlement agreements were in English; others were translated into Spanish. The settlement agreements differed only in the amount offered to each employee. 182 of the 232 potential class members signed settlement agreements. Plaintiff did not sign a settlement agreement.

Plaintiff's Motion for Class Certification

Plaintiff moved to certify a class of all nonexempt employees who worked at Kokkari beginning in October 2008, including those who had settled their claims against

We need not recite the facts underlying plaintiff's causes of action. "The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 (*Brinker*).)

Kokkari. Plaintiff alleged Kokkari had a "uniform policy" of: (1) changing employee time records; (2) failing to provide meal or rest breaks; (3) failing to compensate employees for purchasing and maintaining uniforms; (4) withholding tips from servers; and (5) failing to provide accurate wage statements. Plaintiff argued the class was ascertainable and sufficiently numerous, common issues of fact and law predominated, and that his claims were amenable to certification. In addition, plaintiff contended his claims were typical of the putative class because: (1) he "worked at Kokkari during the class period and operated under the policies that he alleges violated California law[;]" and (2) the settlement agreements presented "a uniform question that will apply to all those who signed the releases." (Fn. omitted.) Finally, plaintiff claimed he would fairly and adequately represent the class.

# Kokkari's Opposition and Plaintiff's Reply

In opposition to the motion, Kokkari argued the class was not sufficiently numerous because the majority of the proposed class had settled their claims. According to Kokkari, there were only 33 "remaining proposed class members who ha[d] not signed releases" and who could be located. Kokkari's opposition attached the signed settlement agreements. Finally, Kokkari argued plaintiff was not an adequate class representative because his dishonesty and criminal history called "into question his ability to serve as a fiduciary and adequately represent the interests of absent class members." Kokkari noted plaintiff had lied on his job application, had been fired twice, had two felony DUI convictions, and had served jail time.

In reply, plaintiff argued the "question of whether Kokkari may use its solicitation of settlement agreements . . . to limit the size of the class, is a uniform question that will apply to all of the those members of the class who signed settlement agreements." Plaintiff also claimed the circumstances surrounding the settlement agreements were "a uniform legal issue the resolution of which will apply to the entire class" because many who signed the settlement agreements received the same amount of money, irrespective of their length of employment at Kokkari or the "value" of the claims they settled.

Finally, plaintiff claimed he was an adequate class representative because his criminal history was irrelevant and he "was a good employee for Kokkari."

At a hearing on the class certification motion, the court explained it could not determine "whether there are predominate questions of fact and law until we resolve who it is that might be in the class[,]" and concluded "the fact that there might be a challenge to the validity of the settlements does not . . . indicate a predominate common question. Instead, the question of who might be in the class indicates a predominate individual question." As the court explained, "I don't see a common question regarding who's in the class or who's potentially in the class, and without that, you can't know whether a class should be certified."

The court also questioned whether plaintiff's claims were typical of the class, explaining: "I don't see [plaintiff] having a typical claim. He did not release his claims, so whatever reasons and whatever standards might be at issue on whether these releases are enforceable or not would have nothing to do with him. He would not have a typical claim. [¶] And the fact that he has underlying claims doesn't render his situation typical. As a matter of fact, it shines a bright light as to why he's different than the rest of them. I don't see how he could be a typical class representative." Finally, the court questioned whether plaintiff was a suitable class representative. Toward the end of the hearing, counsel for plaintiff "request[ed] leave to amend to substitute in a new class representative."

# Order Denying Class Certification

In a written order, the trial court denied plaintiff's class certification motion, concluding: (1) common issues of fact and law did not predominate because resolving the enforceability of the settlement agreements required an individualized inquiry into each agreement; (2) the class was not ascertainable until the court determined which settlement agreements, if any, were enforceable; (3) plaintiff's claims were not typical of the putative class because he did not sign a settlement agreement; and (4) plaintiff was not an appropriate class representative.

### DISCUSSION

A party seeking to certify a class action must establish: (1) the existence of "a sufficiently numerous, ascertainable class[;] (2) [] a well-defined community of interest[;] and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 988, quoting *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside Bank*); see also *Brinker, supra*, 53 Cal.4th at p. 1021; Code Civ. Proc., § 382.) ""[T]he "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." [Citation.]" (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1221 (*Hendershot*), quoting *Fireside Bank, supra*, 40 Cal.4th at p. 1089.) The party seeking class certification must produce substantial evidence establishing each of these elements. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922-923 (*Washington Mutual*).)

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## Standard of Review

We review the trial court's denial of class certification for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) "Trial courts have discretion in granting or denying motions for class certification because they are well situated to evaluate the efficiencies and practicalities of permitting a class action. [Citation.] . . . [¶] We will affirm an order denying class certification if any of the trial court's stated reasons was valid and sufficient to justify the order, and it is supported by substantial evidence. [Citations.]" (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939.) "[A] trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436, citations omitted.)

# Substantial Evidence Supports the Finding that Plaintiff's Claims Were Not Typical of the Proposed Class

Plaintiff challenges the court's determination that his claims were not typical of the putative class. As stated above, the court denied plaintiff's certification motion because "[plaintiff] did not sign a settlement agreement. Thus, his claims are not typical of the putative class members who have released their claims but who might assert that their settlement agreements are invalid. Indeed, it has not been shown that any putative class members who have a desire and the grounds to negate their settlements, let alone that . . . Plaintiff is appropriately representative of them."

The purpose of the typicality requirement "is to assure that the interest of the named representative aligns with the interests of the class. [Citation.] . . . The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" [Citation.]" (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375, review den. Feb. 11, 2015, S223373.) When determining whether a proposed representative's claims and defenses are typical of the proposed class, a trial court may consider whether the representative and class members have signed settlement agreements.<sup>2</sup> (See *Hendershot*, *supra*, 228

We decline plaintiff's suggestion to disapprove of Kokkari's use of settlement agreements "to limit the size of the class." Under California law, an employer may solicit and obtain settlement agreements from putative class members regarding disputed compensation claims. (*Chindarah v. Pick Up Stix, Inc.* (2009) 171 Cal.App.4th 796, 802; Watkins v. Wachovia Corp. (2009) 172 Cal.App.4th 1576, 1592.) Plaintiff's reliance on Gulf Oil Co. v. Bernard (1981) 452 U.S. 89 (Gulf Oil) and Kleiner v. First Nat. Bank of Atlanta (11th Cir. 1985) 751 F.2d 1193 (Kleiner) does not alter our conclusion. Gulf Oil disapproved of a district court order imposing "a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court." (Gulf Oil, supra, at pp. 94-95.) Kleiner concerned an employer's communications with a certified class in violation of a court order. (Kleiner, supra, at p. 1197.)

Cal.App.4th at p. 1223; see also *Fireside Bank, supra*, 40 Cal.4th at p. 1090 [trial court may consider whether class "representative is subject to unique defenses"].)

Numerous federal courts have held a proposed class representative cannot establish typicality where members of the proposed class have signed settlement agreements but the proposed representative has not.<sup>3</sup> (*Bublitz v. E.I. du Pont de Nemours and Co.* (S.D. Iowa 2001) 202 F.R.D. 251, 257 [noting courts' reluctance "to let class members who have executed waivers or releases to be represented by someone who has not executed the same"]; *Thonen v. McNeil-Akron, Inc.* (N.D. Ohio 1986) 661 F. Supp. 1271, 1274 [no typicality where plaintiffs, unlike proposed class members, had not signed "an accord and satisfaction agreement"]; *Muller v. Curtis Pub. Co.* (E.D. Pa. 1973) 57 F.R.D 532, 535 [proposed class representative's claim was not typical because he was "only member of the alleged class" who had not settled]; *Swoope v. BellSouth Telecommunications, Inc.* (N.D. Miss.1998) 1998 WL 433952 [named plaintiffs' claims or defenses were "not typical" because they did not sign releases, "whereas most of the rest of the proposed class members did sign releases"].)

Melong v. Micronesian Claims Commission (D.C. Cir. 1980) 643 F.2d 10, 13 (Melong) is instructive. There, a federal appellate court affirmed denial of class certification where some class members had signed releases but the proposed class representatives had not. (Melong, supra, 643 F.2d at p. 15.) The Melong court observed the issue was not "a novel one; it has been addressed often by courts in a variety of cases involving proposed class actions. In each instance, the court considering the question has concluded that proposed class members who have executed releases [cannot] be represented by individuals who have not executed a release." (Id. at p. 13.) As Melong explained, "The execution of a release does not conclusively bar prosecution of the underlying claim. The release itself may be found to be defective and therefore void.

<sup>&</sup>quot;For guidance in class certification matters, California courts may look to the Federal Rules of Civil Procedure, rule 23 (28 U.S.C.), and case law interpreting that provision. [Citation.]" (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 146, fn. 2.)

The . . . existence of such releases adds new and significant issues to actions brought on the underlying claims. When the purported class representative has not executed a release and need not establish that the release is defective in his individual case, serious questions are raised concerning the typicality of the class representative's claims and the adequacy of his representation of other class members. . . . [¶] [W]e hold that these class representatives, none of whom have signed releases, may not prosecute this action on behalf of over 7,000 claimants who have." (*Id.* at p. 15.)

As in *Melong* and the cases cited above, plaintiff cannot satisfy the typicality requirement because his legal position is different from most of the proposed class. Unlike the majority of the proposed class, plaintiff did not sign a settlement agreement and "need not establish that the release is defective in his individual case[.]" (*Melong, supra*, 643 F.2d at p. 15.) "Having refused to settle, plaintiff has no personal reason to be concerned with the means by which [Kokkari] induced settlements from others and therefore has no real interest in proving those settlements were wrongfully obtained. Thus his interest is not coextensive with the interests of the class members who settled, and his claim is not typical of those of the class." (*Greeley v. KLM Royal Dutch Airlines* (S.D.N.Y. 1980) 85 F.R.D. 697, 701; see also *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99 [no typicality where class representative's interests are "antagonistic to or in conflict with the objectives'" of the class].)

Plaintiff makes no attempt to distinguish *Melong* or the authorities cited above and instead relies on two cases, neither of which applies here. In *Bittinger v. Tecumseh Products Co.* (6th Cir. 1997) 123 F.3d 884 (*Bittinger*), the Sixth Circuit Court of Appeals held the proposed class representative's claim was typical because he signed a release and, as a result, his claim was aligned with the majority of proposed class members. (*Ibid.*) Here — and in contrast to *Bittinger* — plaintiff's claims are not aligned with the majority of the class because he did not sign a release. *Avilez v. Pinkerton Government Services* (C.D. Cal. 2012) 286 F.R.D 450 (*Avilez*) is distinguishable because that case concerned class action waivers, not settlement agreements releasing the defendants from liability. (*Id.* at pp. 456-457.)

Plaintiff also relies on *Herrera v. LCS Financial Services Corp.* (N.D. Cal. 2011) 274 F.R.D. 666 (*Herrera*) but that case does not compel a different result. In *Herrera*, the defendant opposed class certification by claiming it intended to "raise various defenses" — including "arbitration agreements [and] release of claims" — with respect to some class members. (*Id.* at p. 681.) The district court rejected this argument and held "[t]he fact that some members of a putative class may have signed arbitration agreements or released claims against a defendant does not bar class certification." (*Ibid.*) *Herrera* has limited application here for at least two reasons. First, *Herrera* did not consider whether the proposed class representative signed an arbitration agreement or release, nor how many proposed class members might be subject to such agreements. Second, the *Herrera* court's generalized statement that the existence of arbitration agreements or settlement agreements "does not bar class certification" does not demonstrate the court in this case abused its discretion by concluding otherwise, particularly where plaintiff did not rely on *Herrera* in the trial court. Plaintiff does not explain how *Herrera* overcomes the trial court's conclusion that plaintiff failed to establish typicality.

We are not persuaded by plaintiff's claim that the "settlement agreements present common questions for a subset of the class." Numerous courts have rejected this argument and have determined "the question of whether a release was knowingly and voluntarily entered into requires investigation into individual circumstances, thus rendering it unsuitable for class resolution." (*Romero v. AllState Ins. Co.* (E.D. Pa. 2014) \_\_\_\_ F.Supp.3d \_\_\_\_ [2014 WL 4966147]; see also *Spann v. AOL Time Warner, Inc.* (S.D.N.Y. 2003) 219 F.R.D. 307, 318 [releases "insert individualized issues into this lawsuit" and prevented a finding of typicality].) Here, determining the validity and applicability of the settlement agreements "necessitate[s] examination of the circumstances under which each [settlement agreement] was executed." (*Hall v. Burger King Corp.* (S.D. Fla. 1992) 1992 WL 372354).)<sup>4</sup> As the trial court recognized, "the facts

We reject any argument premised on the notion that the trial court erred by failing to certify a subclass of employees who did not sign settlement agreements because plaintiff did not sufficiently raise this argument in the trial court. Plaintiff did not request

are not going to be the same" with respect to each settlement agreement because "some employees may have consulted a lawyer. Some may have business training. Some may have asked questions. Some may have talked it over with three or four other people. . . . I can't say that it is axiomatic that they all would have gotten the same presentation . . . [¶] The fact that the agreements are the same, I'm not sure matters. They all would have different amounts of money that in their mind would relate to whether this was an acceptable deal to them."

Plaintiff's claims and defenses are not typical for the additional reason that the validity and enforceability of the settlement agreements are threshold questions with the potential to become a "'major focus of the litigation.'" (*Fireside Bank, supra, 40 Cal.4th at p. 1091*, citation omitted [proposed class representative may be "atypical" where he or she is subject to "factually intensive or legally complex unique defenses" likely to become a "'major focus of the litigation'"].) These threshold questions — whether particular class members who signed settlement agreements wish to challenge the validity of the agreements, and whether the settlement agreements are valid and cover the subject matter of the litigation — "would assume major importance" in the litigation and would necessarily need to be decided before the merits. (*Ciarlante v. Brown & Williamson* 

the creation of subclasses in his class certification motion. Instead, he waited until the end of the hearing on the motion to note: "we still have . . . individuals [who] have not entered into the settlement agreements, so those individuals would be appropriate for certification on the claims presented." (Compare Avilez, supra, 286 F.R.D. at p. 456 [plaintiff "alternatively move[d] . . . to certify . . . [s]ubclasses . . . due to Defendant's potential affirmative defense regarding some employees' purported agreement to waive their right to bring a class action"].) For the first time in her reply brief on appeal, plaintiff suggests the "presence of the releases Kokkari obtained does not impact any of the elements of class certification, other than potentially calling for the creation of subclasses" and notes "the proper way to deal with this issue is to certify the class and create subclasses." Counsel reiterated this claim at oral argument. We reject arguments made for the first time in reply or at oral argument. (Larson v. UHS of Rancho Springs, Inc. (2014) 230 Cal.App.4th 336, 353 ["argument is forfeited" where 'it is raised for the first time in [appellant's] reply brief without a showing of good cause'"]; People v. Friend (2009) 47 Cal.4th 1, 74, fn. 38 [rejecting contention raised for the first time at oral argument].)

*Tobacco Corp.* (E.D. Pa. 1995) 1995 WL 764579.) Under the circumstances, we cannot conclude the court erred by concluding plaintiff could not establish typicality. (See *Fireside Bank, supra,* 40 Cal.4th at p. 1091.)

Relying on *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 (*La Sala*), plaintiff contends the court should have granted him "leave to propose a new class representative[.]" We are not persuaded. In *La Sala*, plaintiffs brought a class action lawsuit against American Savings & Loan Association alleging a provision in its form trust deed constituted an invalid restraint upon alienation. The lender offered to waive enforcement of that provision for the named plaintiffs. The trial court ruled the "named plaintiffs no longer represented the class" as a result of this waiver and "dismissed the action." (*Id.* at p. 868.) The Supreme Court reversed, holding where a court "concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative." (*Id.* at p. 872.)

La Sala "prevents a prospective defendant from avoiding a class action by 'picking off' prospective class action plaintiffs one by one, settling each individual claim in an attempt to disqualify the named plaintiff as a class representative." (Larner v. Los Angeles Doctors Hospital Associates, LP (2008) 168 Cal.App.4th 1291, 1299 (Larner).) The La Sala "rule is usually applied in situations where the class representative originally had standing, but has since lost it by intervening law or facts." (First American Title Ins. Co. v. Superior Court (2007) 146 Cal.App.4th 1564, 1574 (First American).) We have no quarrel with the rule from La Sala, but conclude plaintiff's reliance on that case is misplaced because "[w]e do not have such facts here" — this is not a "picking off" case. (First American, supra, at p. 1575; Larner, supra, at p. 1299.)

Second, the court was within its discretion to deny plaintiff's request for leave to present a new class representative because it was untimely and would prejudice Kokkari. "'If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also

results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.' [Citation.]" (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1308 (*Jaimez*), quoting *Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Here, plaintiff waited until the hearing on the motion to request leave to amend, and did not propose a new class representative. (See *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50, 67, petn. for review pending, petn. filed Jan. 15, 2015, S223784 [trial court's denial of motion to amend class certification complaint to redefine the class was not an abuse of discretion]; compare *Jaimez, supra,* 181 Cal.App.4th at p. 1308 [court erred by denying timely-filed written motion to amend class action complaint where plaintiff "presented two new class representatives (in direct response to the trial court's concern regarding the adequacy of [plaintiff] as a class representative)"].)

Reviewing the certification order deferentially (*Fireside Bank, supra*, 40 Cal.4th at p. 1091) and presuming "in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record" (*Brinker, supra*, 53 Cal.4th at p. 1022), we conclude substantial evidence supports the court's finding that plaintiff failed to establish typicality where the majority of the proposed class signed settlement agreements but plaintiff did not. Our conclusion promotes the purpose of the typicality rule by ensuring the proposed class representative has an incentive to prosecute the action for the class and does not have a conflict of interest with the class. (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212 [class representative's personal claim cannot be inconsistent with class members' claims]; *Avilez, supra*, 286 F.R.D. at p. 457 ["the purpose of the typicality requirement is to *protect* the putative class"].)

As stated above, plaintiff has the burden to establish the "propriety of class certification" (*Washington Mutual, supra,* 24 Cal.4th at p. 922) and ""[a]ny valid pertinent reason stated will be sufficient to uphold the order." [Citation.]" (*Ramirez v. Balboa Thrift & Loan* (2013) 215 Cal.App.4th 765, 776-777.) Having concluded the court denied plaintiff's certification motion on a legally valid ground supported by substantial evidence, we need not address plaintiff's remaining challenges to the denial of

class certification.	(Mora v. Big Lots Stores,	Inc. (2011) 194 Cal.A	pp.4th 496, 512 & fn.
14.)			

	DISPOSITION		
The order denying class	certification is affirmed.	Defendants Kol	kkari LTD,
George Marcus, and Kenneth F	rangadakis shall recover	costs on appeal.	(Cal. Rules of
Court, rule 8.278(a).)			
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	J	lones, P.J.	
We concur:			
Simons, J.			

Needham, J.